CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE ENFORCEMENT OF SIZE AND WEIGHT REGULATIONS

Plaintiff motor carrier was engaged in interstate commerce, holding a certificate of convenience and necessity from the Interstate Commerce Commission. Pursuant to a state statute, ILL. REV. STAT. c. 95½, §229 (b) (1953), Illinois sought to suspend the carrier's right to use the state highways after plaintiff had repeatedly violated state size and weight regulations set forth, *id.* §228. Plaintiff brought action against the Attorney General of Illinois, seeking a declaratory judgment that such a sanction was an unconstitutional burden on interstate commerce. The lower court entered judgment adverse to the carrier. The Supreme Court of Illinois reversed. 2 Ill. 2d 58, 117 N.E. 2d 106 (1954). On certiorari to the Supreme Court of the United States, *held,* affirmed. State power to suspend interstate motor carriers from the highways has been superseded by the federal government under the Federal Motor Carrier Act. *Castle* v. *Hayes Freight Lines, Inc.,* 348 U.S. 61 (1954).

Matters of interstate commerce which do not require national uniformity may be regulated by the states as long as the federal government has not elected to exercise its paramount power. When supersedure occurs, Congressional pre-emption of the field may be partial or it may be complete. *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942). Determination of the degree of pre-emption presents difficult questions of Congressional intent, as is attested by developments in state and federal regulation of motor carriers. *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.,* 303 U.S. 177 (1938).

The scope of state authority to regulate motor carriers in interstate commerce was greatly restricted by passage of the Motor Carrier Act, 49 STAT. 543 (1935), 49 U.S.C. §§301-327 (1952). This act gave the Interestate Commerce Commission authority to issue certificates of convenience and necessity to interstate motor carriers and to further regulate the industry by establishing requirements with respect to "continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety and operation of equipment." 49 STAT. 546 (1935), 49 U.S.C. §304(a) (1952). To this extent, therefore, state regulatory power was precluded. Section 325 of the act authorizes the Interstate Commerce Commission to "investigate and report" on the need for federal regulation of sizes and weight of motor vehicles covered by the act. This provision has been held to be a reservation from the power granted to the commission in §304(a), leaving the states free to regulate sizes and weight of motor carriers. *Maurer* v. *Hamilton,* 309 U.S. 598, 611 (1940).

Congress still has not elected to regulate the sizes and weight of vehicles moving in interstate commerce. An Illinois statute imposing maximum gross weight limitations and regulations regarding weight dis-

tribution on axles of motor vehicles using the state highways was held to be a reasonable exercise of the state police power and not violative of the commerce clause. *Werner Transp. Co.* v. *Hughes*, 19 F. Supp. 425 (N.D. Ill. 1937). In 1951 a new penalty provision was added to this Illinois statute. That provision provides, upon conviction for violation of the regulations, a fine which is graduated according to the amount of the overload. After ten such convictions within a year, the state may bring an action to suspend for ninety days the violator's privilege of using the state's highways. If ten more convictions follow at any time thereafter, a year's suspension can be imposed. The Supreme Court in the instant case unanimously affirmed the decision of the *Werner Transp. Co.* case, *supra*, that such regulations were valid, but it declared unconstitutional the provision allowing suspension for violation of the regulations. Although the state weight limitations in themselves did not conflict with the Motor Carrier Act, the suspension provision infringed upon the federal power to decide what vehicles covered by the act shall operate in interstate commerce. The federal government had superseded the former state power to control their highways in this manner by restricting the right to engage in interstate commerce to those motor carriers which held certificates of convenience and necessity issued by the Interstate Commerce Commission. 49 STAT. 551 (1935), 49 U.S.C. §306 (1952).

This decision removes the most effective means available to the states for enforcement of their size and weight regulations. It can be expected that fines for violations will be paid by the larger motor carriers as part of the expense of operating in states which have relatively low size and weight limitations. Evidently the respondent in the principal case was not deterred by the prospect of paying fines, for it had been charged with 301 minor violations of the Illinois statute. The difficulty with imposing a fine severe enough to force the motor carriers to observe the regulations is that it might be invalidated for attempting by indirection what the suspension provision of the Illinois statute cannot constitutionally do directly. The suggestion of Justice Black in the principal case is for the states to rely on a regulation of the Interstate Commerce Commission which requires motor carriers to abide by valid state highway regulations. 49 C.F.R. §192.3 (Cum. Supp. 1954). If a carrier fails to do this, the Interstate Commerce Commission can revoke its certificate. 49 STAT. 555 (1935), 49 U.S.C. §312 (1952). If this enforcement procedure proves ineffectual, Congress may have to adopt uniform size and weight regulations.

Dirken T. Voelker

CONSTITUTIONAL LAW—STATE TAXATION OF GROSS RECEIPTS FROM INTERSTATE COMMERCE

Complainant, a Delaware corporation, instituted action in an Illinois court to enjoin the state treasurer from paying into the state treasury certain monies collected from complainant pursuant to a state gross receipts

assessment. ILL. REV. STAT. c. 120 §467.17. Complainant transported gas, via pipeline, from Louisiana to Illinois where it sold the gas to utilities companies for direct consumption. Prior to sale, the gas was stored in pipelines, by the use of high pressure techniques, but no physical change was wrought on it. Illinois levied a charge on the gross receipts derived from these transactions within the state confines. The corporation asserted its activities constituted a type of interstate commerce and were thus beyond the constitutional reach of state taxing power. Agreeing, in an opinion reminiscent of the famous *Cooley* case, the Supreme Court of Illinois ruled the sales to be in interstate commerce and invalidated the assessment. The court rejected the theory that a state might levey on an interstate transaction if the tax statute were so constructed as to eliminate the contingency of multiple burden. Two judges, dissenting, felt the tax was on an intrastate transaction since the sale was for consumption and did not contemplate a resale by the buyers. Alternatively, the dissenters inclined to the view which holds valid a state charge on interstate commerce if the taxing state possesses sufficient contact with the activity or if such levy be apportioned to coincide with the quantum of state contact. *Mississippi River Fuel Corp.* v. *Hoffman*, ___ Ill. ___, 123 N.E. 2d 503 (1955).

That these sales were interstate in character admits of no serious dispute. Although there are earlier decisions to the contrary, it is now consistently held that a sale across state lines upon a buyer's order is interstate commerce although no resale is contemplated. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947); *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950). The *East Ohio* case held that whether the sale be for direct consumption or for resale it is interstate; earlier opinions had ruled a sale for direct consumption intrastate in essence. *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U.S. 465 (1931). Looking more to effect than to esoteric distinctions the Court, of late, has been reluctant to designate a point in time or space which differentiates interstate from intrastate activity. *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682 (1947). The majority of the court, in the instant litigation, was correct in designating the sales interstate commerce.

The question then becomes whether a state may ever tax gross receipts from an interstate activity in an area requiring national uniformity and, if so, upon what contingencies the power rests. From the date of the Cooley Compromise until opinions of late-1930 vintage the Court unequivocally took the position that states might not levy on transactions designated interstate even when such charges were apportioned to the amount of business done within the taxing state's confines. *Fisher's Blend Station Inc.* v. *State Tax Commission*. 297 U.S. 650 (1936).

With the coming of *Western Live Stock Co.* v. *Bureau of Revenue*, 303 U.S. 250 (1938), a new concept made its debut into this field. Mr. Justice Stone, by way of dictum, indicated in the *Western Live Stock*

decision that a gross receipts tax upon interstate commerce would be validated if apportioned. A subsequent decision, again by way of dictum, gave added impetus to the idea that a method might be achieved to obviate the harshness of the *Cooley* doctrine. *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307 (1938). The theory advanced in support of such an apportionment concept derived from the fact that such levies are, by their nature, incapable of being repeated—if each state were to tax only the amount of business done within its confines the possibility of multiple state burden on interstate commerce would be eliminated. Unapportioned gross receipts levies clearly continued in disfavor. *Gwin, White and Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939).

The nascent concept of apportioned gross receipts taxation appeared to receive collateral support from decisions involving state taxation of interstate sales. Upheld was an assessment by the State of New York upon sales of goods shipped from outstate on buyer's orders. *McGoldrick* v. *Berwind-White Mining Co.*, 309 U.S. 33 (1940); *McGoldrick* v. *Felt Tarrant Manufacturing Co.*, 309 U.S. 70 (1940). Faced with the contention that the *McGoldrick* cases permitted multiple state taxation, the Court later made clear that it had vested only the state of destination with power to levy on interstate sales. *Freeman* v. *Hewit*, 329 U.S. 249 (1946). There, the state of origin, Indiana, was prohibited from taxing an interstate sale which terminated in New York. Meantime, the Court had appended to the privilege accorded the state of destination, the further qualification that the receiving jurisdiction must also possess a superior incidence of contact with the transaction. *McLeod* v. *Dilworth*, 322 U.S. 327 (1944), denied Arkansas' taxing power when the contract arose, delivery was made, and title passed in another state. In designating one state as privileged to tax, the Court had apparently borrowed a page from an outmoded conflict of laws doctrine which designated as controlling, the law of the state having the most significant contact with a transaction occurring in several states. *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897). It was clear after the *McLeod* opinion, that a state possessed the requisite constitutional power to tax an interstate sale if it were the place of destination and a sufficient number of the incidents of sale obtained within its borders.

Despite *McLeod's* restrictive effect, the newer decisions on state taxation of interstate sales accepted the premise that the constitutional interdiction lay, not in any taxation of interstate commerce, but in the hazard of multiple tax burden upon that commerce. Multiple burden is as quickly avoided by apportionment of a total taxable transaction among several states as by choice of a single jurisdiction with full taxing power. But although the Court had a clear opportunity to validate an apportioned gross receipts assessment in *Joseph* v. *Weekes Stevedoring Co.*, 330 U.S. 422 (1947), it declined to do so. In the *Weekes* decision, a New York company, whose interstate activities were totally confined within the state,

was freed from the obligation of paying a clearly apportioned gross receipts levy. The apportionment doctrine as expounded by Stone was not yet dead however, since the apportionment faction of the Court later sustained a tax similar to the one invalidated in the *Weekes* case. Four members of the court were willing to rest the decision on an apportionment concept but the concurrence of Mr. Justice Burton, who conceived the transaction to be intrastate, was needed to uphold the tax. *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662 (1949). Any doubts as to the *Agency, Inc.* v. *Virginia*, 347 U.S. 359 (1954), wherein an apportioned gross receipts tax was struck down, and *Spector Motor Service, Inc.* v. gross receipts tax was struck down, and *Spector Motor Service Inc.* v. *O'Connor*, 340 U.S. 602 (1951) which disallowed an apportioned net receipts tax. The *Spector* opinion disavowed the apportionment doctrine *eo nomine*. Whatever may be said of the doctrine, it is an inescapable legal fact that it is not the law.

The Illinois court was unquestionably correct, in the instant litigation, in categorizing the taxed sales as interstate commerce. In light of the recent decisions, it therefore correctly dismissed apportionment as interesting theory but poor law. Nevertheless, in view of the regularity with which dissents accompany the decisions in this field of law, the dissenting Illinois judges can find some solace in the possibility that future judicial convolutions may yet result in the employment of the eminently sensible apportionment concept to exorcize the *Cooley* dilemma.

William Franklin Sherman

CONTEMPT—TAKING PHOTOGRAPH AGAINST JUDGE'S ORDERS

During an arraignment on an indictment in the common pleas court, a photograph was taken by a newspaper photographer at the direction of the city editor. This was contrary to and in direct disobedience of the express order of the judge then sitting. The photographer, city editor and a reporter were all cited for contempt. The court of appeals affirmed the judgment. 97 Ohio App. 1, 118 N.E. 2d 853. On appeal to the Ohio Supreme Court, *held*, the deliberate disobedience of a court's order reasonably necessary to maintain order and prevent unnecessary disturbance and distraction constitutes a contempt of court. *Ohio* v. *Clifford*, 162 Ohio St. 370, 123 N.E. 2d 8 (1954).

The earliest reported case dealing with the power of a judge to cite a photographer for contempt for the taking of photographs in the courtroom is *Ex Parte Sturm, et al*, 152 Md. 114, 136 Atl. 312, (1927). Here, immediately before a trial on a murder indictment, the judge announced that he would not allow any pictures to be taken in the courtroom. A newspaper photographer, under the direction of his city editor, secretly took pictures of the trial with a small camera. After the publication of the pictures, the judge cited the manager, editors, city editor and two photographers of the newspaper for contempt. In upholding the citation,

the Court of Appeals of Maryland recognized the duty of a court to afford ample scope to the liberty of the press, but stated that this should not be carried to the point where it would become an undue encroachment on the power of judicial tribunals to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of their procedure.

Again in *Matter of Seed*, 140 Misc. 681, 251 N.Y.S. 615 (1931), a newspaper photographer was adjudged in contempt for exploding a flashbulb in the court-house corridor, 100 feet from the courtroom, for the purpose of photographing a prisoner about to enter the courtroom. The court here felt that the molestation of prisoners by photographers might lead to riots or other disorders which would aid the prisoners in escaping. Further, reasoned the court, the noise creates a disturbance of the court and may cause crowding outside the courtroom doors.

However, both of these cases were decided before the First Amendment guaranties of free speech and free press were held by the Supreme Court of the United States to be applicable to the states by reason of the Fourteenth Amendment. See George Foster, Jr., *The 1931 Personal Liberties Cases* 9 N.Y.U. L.Q. REV. 64 (1932). Moreover they preceded in time even more recent Supreme Court decisions which dispel former doubts as to whether judicial action can be violative of substantive as well as procedural due process. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *A.F.L. v. Swing*, 312 U.S. 321 (1941); *Shelley v. Kraemer*, 334 U.S. 1 (1948). These major constitutional developments require a revaluation of the power of courts to commit for contempt those who seek by picture or word, to convey to the public the events occurring in judicial proceedings.

The gathering of news and its dissemination by written word is clearly within the guaranty of freedom of the press. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). After much uncertainty, the motion picture has now been held to be a medium of expression also within the constitutional guaranty. *Burstyn v. Wilson*, 343 U.S. 495 (1952). Inasmuch as the newspaper photograph is likewise a means of transmitting information, closely linked to the traditional medium of the news article, it would seem that it is also encompassed by the guaranty.

Once a medium of expression is found to be within the guaranty of freedom of speech and of the press, only a substantial public interest will justify governmental interference or restriction. *Near v. Minnesota*, 283 U.S. 697 (1931). In one of its major contempt of court decisions, a divided United States Supreme Court declared that abridgement of the constitutional freedom can occur only where the exercise of the freedom creates a clear and present danger to the due administration of justice. *Bridge v. California*, 314 U.S. 252 (1941). However, in *Fisher v. Pace*, 336 U.S. 155 (1949), a bare majority of the Supreme Court sustained a contempt order against a Texas attorney for continued reference, in his

argument to the jury, to matters which had been withheld from the jury by stipulation, holding that the power of courts to punish contempt in their presence without further proof of facts and without the aid of a jury is looked upon as being essential to preserve their authority and to prevent the administration of justice from falling into disrepute. This gives the impression that the Supreme Court does not require an overriding public interest evidenced by a clear and present danger or a substantial interference with the administration of justice in the case of courts punishing contempt in their presence.

If, in the principal case, the photographer, in his efforts to take a photograph, had in some way inconvenienced the judge, or if the taking of these photographs would in some manner aid in the escape of prisoners, or if the pictures were to be printed in some fashion which would make the judge appear ridiculous, clearly these activities would be given no constitutional protection. But, seemingly, the taking of a picture by a method whereby no one would be disturbed and where there is no criticism of the court nor any attempt to influence, persuade or intimidate it, would now be a protected activity.

The freedom allowed the press in the country has never been construed so broadly as to allow photographs or reporters to make a mockery out of a trial. If the grinding of T.V. cameras, the popping of flashbulbs, or the scurrying about of the cameramen or photograhers should cause such a disturbance that the orderly administration of justice could no longer be achieved there can be no doubt that the court can put an end to the disorder. It would seem that with the increasing advance of modern photography it will be possible to obtain cameras perfected in such a way as to cause absolutely no disturbance in the courtroom. In this event, it would be difficult to perceive just what possible grounds for objecting to their use could be advanced by the court.

Robert Hill

INSURANCE—DUTY TO DEFEND ACTION AGAINST INSURED

Plaintiff contracted with the defendant for liability insurance to indemnify accidents occurring in plaintiff's establishment. The policy provided that assault and battery was to be construed as an accident unless committed by or at the direction of the plaintiff, and that the defendant would defend any suit for which indemnity is assured by the policy, even though such suits be false, groundless or fraudulent. One Lees brought suit against plaintiff alleging he sustained injury by plaintiff's assault and battery. Defendant refused to defend. Plaintiff, to avoid bad publicity, settled the case and brought this action under the policy to recover the amount of the settlement. The trial court entered judgment for plaintiff and the Supreme Court of Pennsylvania reversed, three judges dissenting. *Held*, whether an insurer is required to defend a cause of action against insured is to be determined by whether the petition against

the insured stated a cause of action covered by the terms of the policy. *Wilson v. Maryland Casualty Co.*, 377 Pa. 588, 105 A. 2d 304 (1954).

This type of clause is not uncommon in insurance policies. One of the first decisions construing a duty to defend was *Union Indemnity Co. v. Mostor*, 41 Ohio App. 518, 181 N.E. 495 (1932). In that case the insurer contracted to indemnify for loss by reason of ownership, maintenance or use of an automobile by those who are legally qualified to drive; the court held that the insurer's duty to defend was absolute even though the driver was 16 years of age and a city ordinance required drivers to be 18 years of age. The court said the clause in the policy was an unconditional promise to defend suits for damages alleged to be caused by insured's automobile.

However, a subsequent Ohio case took a different approach. In *Luchte v. State Automobile Mut. Ins. Co.*, 50 Ohio App. 5, 197 N.E. 421 (1935), the policy covered loss caused by use, maintenance, ownership or operation of a coal delivery truck. The driver of the truck dumped the coal on the street before dawn and subsequently a motorcyclist was killed by running into the coal pile. In an action brought by the decedent's estate, the insurer refused to defend. The court held that the insurer is not obligated to defend actions not covered by the insurance contract. The insurer must defend false or groundless actions covered by the insurance policy, but this does not mean the insurer is required to defend actions not covered by the insurance policy. This view was supported in *Ruby Gilmore v. Royal Indemnity Co.*, 31 Ohio St. 287, 62 N.E. 2d 90 (1945).

Obviously, the protection afforded by a policy of the type involved in the principal case provides a valuable benefit to the insured. Under the exclusionary clause the insurer is required to indemnify the insured for his liability for assault and battery committed by third persons who aren't acting under the direction of the insured. Thus, indemnification would apply to cases where an employee commits an assault and battery on a third person where such employee acted in the course of his employment for the furtherance of the employer's business. *Rouda v. Lowry & Goebel Co.*, 9 Ohio App. 91, 31 Ohio L. Abs. 294 (1917). In addition, indemnification would cover situations where the proprietor failed to exercise ordinary care, which would have prevented an assault and battery upon a patron. Thus the proprietor might incur liability for an assault and battery committed on a patron by another patron. *Moon v. Conley*, 9 Ohio App. 16, 30 Ohio Cir. Ct. (N.S.) 14 (1918).

These cases focus on the question whether the injured person's complaint against the insured states a cause of action covered by the terms of the policy. If so, the insurer must defend irrespective of the fact that the suit may be groundless, false or fraudulent. *Casaulty Co. v. Headers*, 118 Ohio St. 429, 161 N.E. 282 (1928). *The Bloom-Rosenblum-Kline*

Co. v. Union Indemnity Co., 121 Ohio St. 220, 167 N.E. 884 (1929). 8 APPLEMAN, INS. LAW AND PRACTICE §4683 (1st ed. 1941).

In determining the insurer's obligation to defend, the language of the insurance contract must first be construed, then the allegations of the complaint against the insured must be interpreted to determine if the action is covered by the contract. *London Guarantee & Accident Co. v. Shafer*, 35 F. Supp. 647 (S.D. Ohio 1940). Where the terms of the policy are ambiguous, the policy is to be construed in favor of the insured. *McAllister v. Century Indem. Co. of Hartford, Conn.*, 24 N.J. Super. 289, 94 A. 2d 345 (1953). *Boyle v. National Gas. Co.*, No. 1132 D.C. Ct. of App., 84 A. 2d 614 (1951). The insured in the principal case does not benefit from this rule as the exclusionary clause "unless committed by or at the direction of the insured" is not ambiguous. In fact, Lees' allegation that the insured struck him with a black-jack is squarely within the terms of the exclusionary clause.

The insured plaintiff in the principal case contended that he should be given the opportunity to prove that he did not commit the alleged assault and battery. He had that opportunity in the suit brought against him; however, in a suit brought by him against the insurer, the latter's duty to defend depends on the pertinent policy provisions. The insured has the opportunity in the present case to show that the allegations against him do come within the terms of the policy. This is all the courts allowed in the cases on which the plaintiff now relies. *Knorr v. Commercial Cas. Ins. Co.*, 171 Pa. Super. 488, 90 A. 2d 387 (1952). *Springfield Township v. Indemnity Ins. Co. of North America*, 361 Pa. 461, 64 A. 2d 761 (1949). The lower court and the dissenting judges placed much weight on *University Club v. Am. Mut. Liability Ins. Co. of Boston*, 124 Pa. Super. 480, 189 A. 534 (1937) wherein the terms of the policy promised to indemnify the insured against liability for damages on account of injuries to those legally employed by the insured. The injured employee's complaint was based on the defective condition of an elevator and incidentally stated that the employee was 17 years of age (only those 18 years of age could legally be employed). The insured recovered from the insurer after the latter's refusal to defend because the injured person based his cause of action on the defective condition of the elevator and did not aver, or specifically rely on any illegal employment. Thus the insured was allowed to show, without thereby introducing any new matter not stated in the complaint, that the employee was in fact 18 years of age. In the principal case, the fact which the insured wants to show would change the nature of the cause of action from a willful tort to one based on negligence.

Application of these considerations to the present case shows that it would make no sense for an insurance company to defend a suit for which it could incur no liability. If the suit brought by Lees had gone to trial, regardless of the outcome the insurer would not have been liable for the

judgment. If Lees had received judgment, it would have been on grounds excluded by the terms of the policy. Thus the duty to defend is correlative with the duty to pay a judgment which may be obtained against the insured in the suit brought by the third party. 8 APPLEMAN, INS. LAW AND PRACTICE §4684 (1st ed. 1941).

Although at first blush it seems that the insured's claim against the inurer is not without merit, "There is," as the Pennsylvania court said, "no authority in any jurisdiction to support plaintiff's position." If the facts were as plaintiff claimed them to be, he settled a groundless claim, and for such a settlement the insurer would not be liable. The insurance company contracted to defend false claims—but it did not agree to defend *any* such claims. It contracted to defend groundless claims which stated facts coming within the terms of the policy. It is submitted that the court reached a correct decision in holding that an insurance company has no duty to defend an action which it did not agree in the contract to defend.

Richard D. Schwab

LABOR LAW—DUTY TO BARGAIN—ONE-YEAR CERTIFICATION RULE

The National Labor Relations Board conducted a representation election in petitioner's Chrysler-Plymouth agency. Local No. 727, International Association of Machinists, won by a vote of eight to five. A week after the election, and one day before the union's certification by the Labor Board as exclusive bargaining representative of petitioner's employees, petitioner received a handwritten letter signed by nine of his thirteen employees, repudiating the union as their bargaining agent. Relying on this clear proof of the union's loss of majority status, petitioner refused to bargain with the union. The Labor Board found petitioner had thereby committed an unfair labor practice under Sections 8(a) (1) and 8(a) (5) of the amended National Labor Relations Act, 29 U.S.C. §§158(a) (1), 158(a) (5), and ordered him to bargain. *Ray Brooks and International Association of Machinists for its District Lodge No. 727*, 98 N.L.R.B. 976 (1952). The Court of Appeals for the Ninth Circuit enforced the Board's order to bargain. *National Labor Relations Board v. Brooks*, 204 F. 2d 899 (9th Cir. 1953). The United States Supreme Court granted certiorari. *Brooks* v. *National Labor Relations Board* 347 U.S. 916 (1954). *Held*: Order affirmed. *Brooks v. National Labor Relations Board*, 348 U.S. 96 (1954).

The National Labor Relations Board, in the disposition of representation cases, is constantly struggling to reconcile two conflicting policies set out in Section 1 of the National Labor Relations Act, 29 U.S.C. §151. On the one hand, it seeks to stabilize employer-employee relations in order to facilitate the uninterrupted flow of commerce. On the other hand, it strives to guarantee to workers the right to be represented by agents of their own choosing. In compromising these two policies, the Board has attempted to preserve the essentials of each. A long line of Board de-

cisions has promulgated the rule that the certification of a union following a Board-conducted election must be honored for a reasonable period, usually one year. *Monarch Aluminum Mfg. Co.*, 41 N.L.R.B. 1 (1942); *Bohn Aluminum and Brass Corporation*, 57 N.L.R.B. 1684 (1944); *Motor Valve and Mfg. Co.*, 58 N.L.R.B. 1057 (1944); *Kimberly-Clark Corp.*, 61 N.L.R.B. 90 (1945).

Certain "unusual circumstances" prompted the Board, before the Taft-Hartley Act was passed, to deviate from the usual rule—(1) when the certified union dissolved or became defunct, *Public Service Electric & Gas Co.*, 59 N.L.R.B. 325 (1944); (2) when, as a result of a schism within the union, substantially all the members and officers of the certified union transferred their affiliation to a new local or international, *Carson Pirie Scott & Co.*, 69 N.L.R.B. 935 (1946); and (3) when the size of the bargaining unit fluctuated radically within a short time, *Westinghouse Electric & Mfg. Co.*, 38 N.L.R.B. 404 (1942).

In 1947 Congress placed greater emphasis upon the stability of labor-management relations by incorporating in the Taft-Hartley amendments to the National Labor Relations Act a provision limiting the number of representation elections in a particular bargaining unit to one annually, §9(c) (3) of the amended National Labor Relations Act, 29 U.S.C. §159(c) (3), and permitting certification only after an election, §9(c) (1) of the amended National Labor Relations Act, 29 U.S.C. §159(c) (1). The arguments are strong that this legislative policy substantially vindicated the Board's "one-year certification" rule. Yet the courts were not consistent in supporting the Board in the enforcement of this rule. In a few cases involving a fact pattern comparable to that in the principal case, the courts reversed the Board's order requiring recognition for a period of a year. *National Labor Relations Board v. Vulcan Forging Co.*, 188 F. 2d 927 (6th Cir. 1951); *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (6th Cir. 1953). One case refused to accept one year as the inexorable rule, holding that a period of 49 weeks was a reasonable period. *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (3rd Cir. 1952).

The Supreme Court had previously held that an employer was obligated to bargain with the union for a reasonable time, despite its loss of majority status, if the diminution in its ranks was attributable to the employer's unfair labor practice. *Frank Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702 (1944). But in the instant case there was no evidence that an unfair practice on the part of the employer had encouraged the workers to abandon their union.

The court in the principal case undertook to resolve the uncertainty that had been created by conflicting circuit court decisions on the issue here presented. It was argued by the petitioner that forcing employees to bargain through a representative they had repudiated would be depriving them of their right to bargain through a representative of their own

choice, which is guaranteed to them by Section 7 of the National Labor Relations Act, 29 U.S.C. §157. But the court felt that §9(c) (1) of the amended National Labor Relations Act, *supra*, must have contemplated that certification would have a certain minimum duration, for without such a period of grace it would have very little practical effect. And cogent policy considerations dictated this determination. Giving the union a minimum tenure encourages the making of a solemn and considered choice at the election, stabilizes industrial relations, reduces inter-union conflicts, renders more manageable the resolution of representation questions, and gives to the certified union a reasonable opportunity to negotiate favorable terms for the employees it represents. The Supreme Court was persuaded by these arguments to give force to the certification for some period of time. The court specifically held that it was within the power of the Board to require that its certification be honored for a reasonable period despite the union's loss of a majority, and that the Board has not abused its discretion by designating one year as reasonable.

After one year has elapsed, the Board has held that an employer may legally refuse to bargain with the union if he has fair doubts about its continuing majority. *Celanese Corporation of America*, 95 N.L.R.B. 664 (1951). But such a practice has also been held to be evidence of bad faith. *United States Gypsum Co.*, 90 N.L.R.B. 964 (1950). Since the state of the law on this point is unsettled, an employer who feels that his duty to bargain is moot can fully protect himself only by continuing to bargain with the certified union, or filing a petition under Section 9(c) (1) (B) of the amended National Labor Relations Act, 29 U.S.C. §159(c) (1) (B).

But for one year there is no doubt of the employer's duty. The instant case declares that the employer must bargain with the certified union for such period, despite the union's loss of majority status, in the absence of the "unusual circumstances." The Board has consistently enforced this rule, and it now has the judicial sanction of the Supreme Court.

David G. Sherman

TORTS—NEGLIGENCE—VIOLATION OF MUNICIPAL ORDINANCE

Action by plaintiff to recover damages for personal injuries suffered when his motorcycle collided with defendant's automobile. Plaintiff alleged the automobile was, at the time of the collision, being driven in a negligent manner by a thief. Defendant had left the automobile on a street in San Francisco, unattended and unlocked, with the ignition key in the switch in violation of a local ordinance which prohibited the leaving of an automobile in such a manner but provided that evidence of violation of the ordinance should not be admissible in a civil action. *Held:* The ordinance is not admissible to show negligence and eliminating the contended effect of the ordinance the petition alleging negligence based upon the remaining facts stated above is insufficient to state a cause of action. *Richards v. Stanley* 271 P. 2d 23 (Cal., 1954).

It is a well established rule that in order for a person to recover damages for injuries on the theory that his injuries resulted from defendant's negligence, he must show that the defendant owed a duty of care to him at the time he sustained the injuries. *Newlin v. New England Telephone and Telegraph Co.*, 316 Mass. 234, 54 N.E. 2d 929 (1944); *Cote v. Litawa*, 96 N.H. 174, 71 A. 2d 792 (1950); *Chatterton v. Pocatello Post*, 70 Idaho 480, 223 P. 2d 389 (1950); 38 AM. JUR., NEGLIGENCE §12; 65 C.J.S., NEGLIGENCE §2. Such a duty may be shown to exist at common law or to have been created by a statute or ordinance. *Monsour v. Excelsior Tobacco Co.*, 115 S.W. 2d 219 (Mo. App. 1938); *Harris v. Joffe*, 28 Cal. 2d 418, 170 P. 2d 454 (1946); *Milner Hotels v. Lyons*, 302 Ky. 717, 196 S.W. 2d 364 (1946).

If a statute or ordinance creates a duty to protect persons or property, some courts hold that violation of such a statute or ordinance is admissible as prima facie or presumptive evidence of negligence. *Tossman v. Newman*, 37 Cal. 2d 522, 233 P. 2d 1 (1951); *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E. 2d 74 (1954); 38 AM. JUR., NEGLIGENCE §158. The Illinois Supreme Court, in the *Ney* case, held that violation of a uniform traffic act prohibiting the leaving of an automobile unattended without first stopping the engine and removing the ignition key was prima facie negligence. Despite the weight of authority to the contrary, however, at least one court has held that violation of a municipal ordinance is not admissible as evidence of negligence. *Ford Adm'r. v. Paducah City Ry.*, 124 Ky. 488, 99 S.W. 355 (1907); See also *Richmond v. Warren Institution For Savings*, 307 Mass. 483, 30 N.E. 2d 407 (1940). The Kentucky court, indicating a different attitude, later held that evidence of violation of a municipal ordinance passed pursuant to statutory authority was admissible to show negligence. *Louisville and N.R. Co. v. Louisville Provision Co.* 212 Ky. 709, 279 S.W. 1100 (1926). A majority of jurisdictions, however, including Ohio, hold that violation of a safety statute or ordinance is negligence per se. *Neave Bldg. Co. v. Roudebush*, 96 Ohio St. 40, 117 N.E. 22 (1917); *Ross v. Hartman*, 78 App. D.C. 217, 139 F. 2d 14 (1943); *Bush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N.E. 2d 851 (1946); 38 AM. JUR., NEGLIGENCE §§38, 42. The *Ross* case involved a District of Columbia statute which prohibited leaving an automobile unlocked and unattended without first removing the ignition keys. The court in that case held that violation of an ordinance intended to promote safety is negligence per se.

Both the *Ross* case and the *Ney* case, though of course not binding on the California court, were urged by the plaintiff as precedents for the general rule that evidence of the violation of the ordinance in the principal case should be admissible to prove negligence. The court in the principal case distinguished those cases, however, on the basis of the ordinances involved, holding that there was a clear legislative intent that the ordinance here involved should not be admissible in a civil action to show negligence.

Having ruled out the admissibility of the ordinance, the question arose as to whether the allegation that the defendant left her automobile on a San Francisco street, unlocked and unattended with the keys in the ignition, which action on the part of the defendant induced the thief to steal the automobile, was a sufficient allegation to state a cause of action against the defendant for injuries received as a result of the negligent operation of the automobile by the thief. In the absence of such an ordinance or statute requiring removal of ignition keys from parked vehicles, other states have held that failure to do so does not, in itself, constitute negligence. *Reti v. Vaniska, Inc.*, 14 N.J. Super. 94, 81 A. 2d 377 (1951); *Fulco v. City Ice Service* 59 So. 2d 198 La. App. (1952); *Kinsley v. Von Atzingen*, 20 N.J. Super. 378, 90 A. 2d 37 (1952). In order to state a cause of action under the above facts the petition must allege that the defendant anticipated, or should have anticipated, that there would be an intermeddler. *Kinsley v. Von Atzingen, supra.* The *Reti* case, *supra*, went so far as to hold that it did not constitute negligence for a taxicab driver, who was waiting for the return of a drunken passenger, to leave the ignition keys in the taxicab and walk past the drunken passenger who was sitting at a bar, and go to the lavatory, during which time the drunken passenger left the bar and drove away with the taxicab and injured the plaintiff.

Failure to remove the ignition keys from a parked vehicle may constitute negligence if it is reasonably forseeable that there may be an intermeddler, as where the person so leaving a vehicle had knowledge that children were constantly playing in the street in the congested area where the vehicle was left, *Connell v. Berland*, 223 App. Div. 234, 228 N.Y.S. 20 (1928), *aff'd without opinion*, 248 N.Y. 641, 162 N.E. 557 (1928) or, where a taxicab driver knowingly leaves his cab with the ignition keys therein and with an intoxicated person in the front seat. *Morris v. Boling*, 31 Tenn. App. 577, 217 S.W. 2d 754 (1948). Though it was urged to accept the holding of *Morris v. Boling, supra*, as being applicable, the court in the principal case held that the possibility that a negligent thief will steal a parked vehicle left unattended on a San Francisco street with the ignition keys therein is not sufficiently forseeable, standing alone, to hold that the failure to remove the keys would constitute negligence. The decision has support in the cases and it appears to be a reasonable one. If, in the future, data indicate that the leaving of ignition keys in a parked vehicle on a city street is sufficiently undesirable or dangerous, it has been demonstrated to be within the power of legislative authority to provide that violation of a statute or ordinance shall be admissible as evidence in a civil action.

Bernard Fultz

UNEMPLOYMENT COMPENSATION—VACATION PERIOD—UNION CONTRACT

Claimant was employed as a production worker in a plant where the workers were given their annual vacation period under the provisions of a union contract by which the plant was closed down during this period. The claimant, a member of the union which was the bargaining agent for his unit, was not entitled to a vacation with pay under the terms of the agreement because he had not had one year's service. He sought work in other industrial plants in the area without success and then applied for benefits under the *Ohio Unemployment Compensation Act*, Ohio Rev. Code, c. 4141 (1345). The referee held that the claimant, through the contract of his bargaining agent, had agreed to the vacation period and, consequently, was voluntarily unemployed. This reasoning was adopted by the Board of Review. The claimant appealed to the Common Pleas Court for Trumbull County which reversed the decision of the Board of Review on the grounds that the claimant was unemployed, not voluntarily, but because of the inability of the employer to find work for him during the vacation period. *Yobe v. Sherwin-Williams Paint Co.*, 68 Ohio L. Abs. 260, 122 N.E. 2d 202 (1954).

The issue in the principal case has caused much confusion and many conflicting state decisions. In his opinion the trial judge asserted that his view reflects the weight of authority in this country, but research shows that only five of eighteen reported cases have allowed compensation. See, 30 A.L.R. 2d 366-74 (1953), *Benefit Series, Unemp. Comp., CCH-Unemp. Ins. Rep.*

The cases denying compensation have given various reasons. *Bennett v. Hix*, ___ W. Va. ___, 79 S.E. 2d 114 (1954), did not allow compensation because the court said that there was a mass shutdown involved and a voluntary act by the employee, but two cases disposed of in the same opinion did allow compensation on the basis that the employees' union had not agreed on a mass shutdown and therefore the employees were involuntarily out of work. *Accord, Beaman v. Bench* 75 Ariz. 345, 256 P. 2d 721 (1953), *Moen v. Director of Division of Unemployment*, 324 Mass. 246, 85 N.E. 2d 779 (1952), denying compensation for the same reasons as *Bennett v. Hix*. In the case of *In re Buffelen Lumber Mfg. Co.*, 32 Wash. 2d 205, 201 P. 2d 194 (1951), compensation was denied and the court held that it was immaterial whether there was a mass shutdown or just a staggered vacation. However, the rules in both the *Moen* and *Buffelen* cases have been subsequently changed by statute to allow compensation. MASS. ANN. LAWS c. 151, §1, (r) (12) and WASH. REV. CODE c. 265, §12 (1951). In *Jackson v. Minn. Honeywell Regulator Co.*, 234 Minn. 52, 47 N.W. 2d 449 (1951), compensation was denied despite the fact that the plant was closed for the purpose both of taking inventory and a vacation period. *American Central Mfg. Co. v. Review Bd. of Indiana*, 119 Ind. App. 430, 88 N.E. 2d 256

(1952), denied compensation and held that even if the union acquiesced indirectly to the vacation shutdown date, the employee was still held to have voluntarily severed his employment. Some courts have held the employee ineligible for compensation because he failed to seek other employment, arguing that he was not available for work as required by the statute. *Mattey v. Compensation Board*, 164 Pa. Super 36, 63 A. 2d 429 (1954), *Levey v. Todd Shipyard Corp.* 279 App. Div. 947, 116 N.Y.S. 612 (1952).

Most Ohio cases have denied compensation. In *Cambridge Glass Co., Robert Adkins v. Bureau of Unemployment Compensation*, CCH UNEMP. INS. REP. §8411 (Ct. of Appeals Guernsey County, 1953), the court held that the employees were bound by the union contract and that they had voluntarily quit their employment. The court held that if compensation were allowed it would abrogate the union contract as to benefits accruing by reason of seniority. In the case of *Barrick v. Board of Review*, CCH UNEMP. INS. REP. §8448 (C.P. Mahoning County #143096, 1954), it was held to be a "voluntary quit," even if the employer had the right to either close down or to stagger the vacations, due to provisions of the union contract. The court distinguished the principal case because in that case the union contract provided for employment during the vacation period in maintenance work for employees not qualified for a paid vacation, and since this work was denied the claimant, he was involuntarily unemployed. The court also held that if compensation were allowed, it would give maximum paid vacations to employees irrespective of their qualifications. In *Gopp v. Board of Review*, CCH UNEMP. INS. REP. §8416 (C.P. Tuscarawas County, 1954), the union had been certified as the bargaining agent by the NLRB, and the court held that since the union was the exclusive bargaining agent of the members they were bound by the terms of the contract. The contract in the *Gopp* case was held to apply to all the employees, not just to those eligible for paid vacations. See also *Arrels v. Board of Review*, CCH UNEMP. INS. REP. §8313 (C.P. Cuyahoga County, 1952) and *Gelock v. O'Neill*, C.P. Mahoning County #136011 (unreported), both of which denied compensation, and *Adams v. Board of Unemp. Comp.*, CCH UNEMP. INS. REP. §8384 (C.P. Miami County, 1953) which held employees ineligible for benefits where they knew of the vacation policy when they accepted work.

The cases allowing compensation are *American Bridge Co. v. Review Board of Indiana*, 121 Ind. App. 576, 98 N.E. 2d 193 (1953), which held that since the plant was shutdown for inventory, there was no connection between the stoppage of operation and the union contract and, therefore, the employee was involuntarily unemployed. See also *Golbuski v. Unemp. Comp. Board*, 171 Pa. Super 634, 91 A. 2d 315 (1952). In *Schettino v. Administrator of Unemp. Comp.*, 138 Conn. 253, 83 A. 2d 217 (1951), the company had the choice of the type of vacation period

and an option to select the date it was to commence, and, therefore, the layoff was held to be under their control and not a voluntary act of the employee. Two other cases have regarded the layoff not as a vacation but as involuntary unemployment and allowed compensation. *In re Rakowski*, 276 App. Div. 625, 97 N.Y.S. 2d 309 (1950), and *Naylor v. Shuron Optical Co.*, 281 App. Div. 721, 117 N.Y.S. 2d 775 (1952).

The basic problem in all of these cases is to determine which of the two tests to apply. The courts which allow compensation tend to look at the amount of control the employer has over the shutdown and the availability of the employee for work. The "availability" test is expressed in the *Ohio Compensation Act*, OHIO REV. CODE §4141.29(a) (4). (G.C. 1345-6(A) (4)). This section states that if an employee is able and willing to work and has tried to obtain other employment, then he may receive compensation under the act. The courts that deny compensation usually follow the "voluntary severance of employment" test which says that if the employee personally or through his agent (union) willingly quits his employment, he is not eligible for compensation. See Teple, *Discharge for Misconduct and Voluntary Quit*, 10 Ohio St. L.J. 191 (1949). Hence there may be conflicting decisions even within the same state.

Not only is there conflict in regard to the test to be used but also as to the relationship between the individual member and the union. Several courts say the unions are the agent for the members in negotiating collective bargaining agreements. *Barnes* v. *Berry*, 169 F. 225 (6th Cir. 1900); *Christansen* v. *Local 680*, 126 N.J. Equity 508, 10 A. 2d 168 (1940); *Mueller* v. *Chicago & N.W. Railroad Co.*, 194 Minn. 83, 259 N.W. 798 (1935). See, *Cambridge Glass Co., Adkins* v. *Bureau of Unemp. Comp., supra; Gopp* v. *Board of Review, supra; Arrels* v. *Bd. of Review, supra;* and 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING §167-68 (1940). Others view the members as third party beneficiaries of the union contract. *Blum & Co. v. Landau*, 23 Ohio App. 426, 155 N.E. 154 (1926), and *Massetta v. National Bronze & Aluminum Foundry Co.*, 46 Ohio Op. 20, 107 N.E. 2d 243 (1952), *reversed on other grounds*, 159 Ohio St. 306, 112 N.E. 2d 15 (1953). The Ohio cases holding the employee a third party beneficiary are cases where the employee is trying to acquire benefits under a contract, while the cases holding him bound by the provisions of the contract are cases, similar to the principal case, in which the employee is denying his obligation under the contract. It would seem then, that in Ohio the employee is bound as the principal of his bargaining agent by the collective bargaining agreement.

The minority courts claim that a decision of "no compensation" is a result of too strict an interpretation of the statute. They say there must be kept in mind the distressing situation against which the statute is directed. *W. T. Grant Co.* v. *Board of Review*, 129 N.J.L. 402, 20 A. 2d

858 (1943). These courts also say that the effect of calling the union the agent of the employee in this situation would be to take away some of the benefits of an act enacted to give him security. They argue that the purpose of the act was to transfer the burden of supporting the unemployed from the taxpayer to the industry which created the unemployment. *Mackey, Unemployment Compensation in Ohio,* 5, (1942). On the other hand, the majority of courts claim that to allow compensation would undermine the union contract by abrogating the union seniority plan as to eligibility for paid vacations. They say that the union combines both incentive and security for its workers, but sometimes the security must be sacrified for incentive. *Cambridge Glass Co., supra,* and *Barrick, supra.*

An Ohio case has held that to make out proof of a voluntary quit, the claimant must have intended to terminate the employment and must have acted to terminate it. *Beatty v. Board of Review,* 433 Bd. of Review 48, May 17, 1948 (unreported). Applying this to the facts in the principal case it can be said, if it be assumed that it is the Ohio view that the union is the agent of the members, that the claimant did act to terminate his employment, and that he did intend to terminate his employment by freely making the union his agent.

In conclusion it would appear that the minority view, as adopted by the principal case, does not adequately reflect the purpose of the unemployment compensation act; although it gives security, it disregards the adverse effect on other provisions of the union contract such as seniority.

David M. Dworken

WORKMEN'S COMPENSATION—PERSONAL INJURY—NEUROSIS

Plaintiff received minor injuries when a scaffold on which he and a fellow worker were working slipped because of a failure of the mechanism supporting it. Plaintiff saved himself by clinging to the cables but he watched his co-worker fall eight stories to his death. Plaintiff brought this suit under the Texas Workmen's Compensation Act, TEX. CIV. STAT. ANN. art. 8306-9 (Vernon 1941), to recover for mental suffering and loss of income resulting from a severe anxiety state which was brought about by the results of the accident. He alleged that since his narrow escape and the ensuing death of his companion he freezes emotionally on the scaffold and that this condition has made it impossible for him to perform the necessary duties of a qualified iron worker. The lower court held for the plaintiff and awarded him 50 percent permanent partial disability. On appeal the court of civil appeals *held,* judgment reversed. Neurosis solely as the result of fright is not compensable because it did not result from a physical injury. The statute provides compensation for employees who sustain disabling injuries in the course of employment and the act defines "injury" as "damage or harm to physical structure of the body and such diseases or infections as naturally result therefrom." The court felt that this interpretation of the definition of injury does not in-

clude mental injury as a result of fright. *American General Insurance Co. v. Bailey*, __ Texas __, 268 S.W. 2d 528 (1954).

The court in the principal case mentioned two recent Texas cases which allowed recovery for neurosis as a disease resulting from an injury but not as the injury itself: *Hood v. Texas Indemnity Insurance Co.* 146 Texas 522, 209 S.W. 2d 345 (1948) and *Traders & General Ins. Co. v. Gibbs*, __ Texas App. __, 229 S.W. 2d 410 (1950). In both cases the neurosis was a product of the physical injury, so the court distinguished the principal case on the grounds that the neurosis in the case at bar was a result of emotional shock and fright alone.

The historical development of precedent in this field began before the appearance of workmen's compensation legislation. An early English case rejected recovery for mental injury alone on the basis that there was no precedent for maintaining such an action. *Victorial Railway Commissioners v. Coultas*, 57 L.J.P.C. 69, 41 T.L.R. 125 (1888). Another early American case denied recovery on the grounds that it would be difficult to approximate the damage in terms of money. *Reed v. Ford*, 129 Ky. 471, 112 S.W. 600 (1908).

The early view was summarized in an 1896 New York case which held that fright could not be the basis of an action and no recovery could be had for any injury resulting from fright. *Mitchell v. Rochester Ry. Co.* 151 N.Y. 107, 45 N.E. 354 (1896). One English case, however, did not follow the strict view but took a more liberal view and allowed recovery on the facts to a mother who suffered fright when she witnessed her child in danger of being run over. *Hambrook v. Stokes Bros.*, 1 K.B. 141, 94 L.J.K.B. 435 (1925). Other objections against allowing recovery for mental injury were that if such recovery were allowed it would increase litigation to such a degree that the courts would become overcrowded, and that the physical consequences were too remote from the mental injury. PROSSER, TORTS §34 (1941).

The three prevailing views used to justify recovery for mental disturbance in an action based on negligence are (1) to allow recovery for mental injury if it is accompanied by a physical injury, (2) to allow recovery where physical harm results from a mental disturbance alone only if there is a physical impact, (3) to allow recovery for physical injury which results from a mental disturbance without requiring an accompanying physical impact. PROSSER, TORTS §34 (1941). The last view is followed by only a small minority of courts. The present weight of authority in cases where there is only mental distress caused by fright and no accompanying physical impact is that there can be no recovery. *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). The reasoning behind these cases is adequately expressed by the following excerpt which jutified no recovery, the theory being that "damages for a nervous shock alone could not be regarded as the natural and reasonable result of negligence on the defendant's part and were therefore too remote to be

recovered." *Penman v. Winnipeg Electric Co.*, 1 D.L.R. 497, 500, (1925) 1 W.W.R. 156, 159, (1925). One or two courts, however, allow recovery for mental injury when the act was wrongful, wilful, or intentional, but not when the action is based purely on negligence. *Schmukler v. Ohio-Bell Telephone Co.*, 66 Ohio L. Abs. 213, 116 N.E. 2d 819 (1953). See also *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912) where recovery was allowed for mental injury from a wilful act of another.

The principal case, however, was brought under a workmen's compensation act and there is no question of negligence under the act because of the strict liability concept. Under the common law a great proportion of industrial accidents remained uncompensated and the burden fell on the workman who was the one that could least afford it. Yet about two-thirds of the states still leave compensation of occupational diseases to the common law. PROSSER, TORTS §69 (1941). Just as under the common law, under the statutes there is divided authority on the problem of diseases not attributable to an injury, while other statutes say nothing, leaving the question to judicial interpretation. PROSSER, TORTS §69 (1941).

There are a number of cases supporting the decision in the principal case, one of which, *In Re Muggelet*, 228 Mass. 57, 116 N.E. 972 (1917), held that neurosis resulting from a poor posture position while working was not a personal injury under the act since a disease of the mind to be compensable, must come from a physical injury. *American Smelting & Refining Co. v. Industrial Commission*, 59 Ariz. 87, 123 P. 2d 163 (1942) allowed recovery under the workmen's compensation act on the basis that neurosis resulting from shock caused by accident was a "disease" resulting from an injury covered by the act. And see *Porter v. W. Horace Williams Co.*, 9 So. 2d 60 (La. App. 1942), where the fact that the traumatic hysteria condition could be traced directly to a compensable accident gave the plaintiff a right of recovery.

The trend to allow recovery for pure nervous or mental injury which began with the decision in *Hambrook v. Stokes Bros.*, *supra*, and which is reflected in a recent decision which allowed recovery for nervous shock without showing an impact, *Mahnke v. Moore*, 197 Md. 61, 77 A 2d 923, (1951), has not yet swayed most courts, especially in the field of workmen's compensation. Ohio follows the stricter view and refuses to allow recovery on mental shock that is not the direct result of physical injury. *Malone v. Industrial Commission of Ohio* 140 Ohio St. 292, 43 N.E. 2d 266 (1943); *Industrial Commission v. Brubaker*, 129 Ohio St. 617, 196 N.E. 409 (1934); *Russell v. Industrial Commission*, 36 Ohio Op. 493, 78 N.E. 2d 406 (1948).

There are three strong arguments for the adoption of the liberal view: the first is that recovery should be allowed because of the strict liability concept of workmen's compensation legislation; the second is that the increased study of the mind by science shows a connection between

the causes of physical and mental injury; and the third is merely acknowledging the obsolescence of legal ideas barring recovery in this field.

A short excerpt from a medical-legal authority will show how far science has progressed in this field of mental injury. "Fear psychoneuroses are abnormal mental states ranging in severity from mere feelings of apprehension to completely disabling psychic illness, induced by psychic shocks received from events which in some particular were to them frightful. The person, who, following an accident, develops such a state may have suffered a mild or moderate physical injury or none at all; he may merely have witnessed it. . . . It should, however, be considered as the consequence of the antecedent accident only when circumstances surrounding the latter were horrible, frightful, or shocking." REED & EMERSON, THE RELATION BETWEEN INJURY AND DISEASE, 438 (1938 ed.).

If we acknowledge that there are physical reactions to a mental shock and that there is no clear line of demarcation between mental and physical injury as stated in, *Mall, Personal Injury Resulting from Shock*, 5 JBA Kan. 303 (1937), then with the progress that science is making in studying both damage to mind and body, the law, it seems obvious, must also progress and throw off the shackles of antiquated precedent. The principal case followed the precedent in the state of Texas which has interpreted the Texas Workmen's Compensation Statute as excluding neurosis from compensable damages. Either the statutes which exclude neurosis as a basis for compensable damages should be amended to cover such an injury, or the courts when interpreting the statutes should read in mental disease and so follow the liberal trend. When this is done the words phobia and neurosis will then become part of the law of damages as much as the word trauma, whether they be under a workmen's compensation statute or in a tort action.

David M. Dworken